INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	12

CITATIONS

Cases:	
Dunn v. *United States*, 284 U. S. 390	12
Harris v. *United States*, 331 U. S. 145	7, 8
Lane v. *United States*, 148 F. 2d 816, certiorari denied, 326 U. S. 720	7
Peoples Savings Bank v. *American Surety Co.*, 15 F. Supp. 911	10
Sealfon v. *United States*, 332 U. S. 575	11
Trupiano v. *United States*, No. 427, O.T. 1947, decided June 14, 1948	8, 9
United States v. *Faw*, 1 Cranch C.C. 487	7
United States Statutes:	
National Stolen Property Act of May 22, 1934, c. 333, 48 Stat. 794, 18 U.S.C. 413:	
Sec. 2(b)	2, 9
Sec. 3	3
Act of August 3, 1939, c. 413, 53 Stat. 1178:	
Sec. 1, 18 U.S.C. 415	9
Sec. 5, 18 U.S.C. 418a, adding Sec. 7 to the National Stolen Property Act	3
Miscellaneous:	
Federal Rules of Criminal Procedure:	
Rule 4(c)(3)	7
Rule 9(c)	7
Negotiability of Travelers Checks, 47 Yale L. J. 470	9

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 118

ALBERT RALPH PETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 256-261) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 25, 1948 (R. 262). The petition for a writ of certiorari was filed June 24, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the fact that F.B.I. agents, who knew that there was an outstanding warrant for petitioner's arrest, remained in petitioner's hotel room for a few hours in order to effectuate the arrest, invalidates a search incident to that arrest.

2. Whether traveler's checks which bear no purchaser's signature are securities having value within the meaning of the National Stolen Property Act.

3. Whether the evidence is sufficient to support the verdict.

4. Whether petitioner's acquittal on the substantive count necessitates his acquittal on the conspiracy count.

STATUTES INVOLVED

The National Stolen Property Act of May 22, 1934, c. 333, 48 Stat. 794, 18 U.S.C. 413 ff., provides in pertinent part:

> SEC. 2 (b) The term "securities" shall include any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of

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goods, wares, and merchandise; or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise, or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing.

SEC. 3. Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both.

The Act of August 3, 1939, c. 413, Sec. 5, 53 Stat. 1178, 1179, 18 U.S.C. 418a, adding Section 7 to the National Stolen Property Act, provides:

> If two or more persons enter into an agreement, confederation, or conspiracy to violate any provision of this Act, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as hereinbefore provided by this Act.

STATEMENT

An indictment in two counts was returned against petitioner and one Rosenberg in the United States

District Court for the Southern District of New York charging violations of the National Stolen Property Act by the transportation in interstate commerce of stolen securities of the value of more than $5,000 and conspiracy to commit that offense (R. 1B). Petitioner was tried alone, Rosenberg having pleaded guilty. He was acquitted on the substantive count and convicted on the conspiracy count (R. 234). He was sentenced to imprisonment for three years and to pay a fine of $2,500 (R. 248). On appeal, the judgment was affirmed (R. 262).

The instruments which form the basis of the prosecution were 185 American Express Travelers checks, the face value of which totaled $5,400 (Gov. Ex. 2, R. 15; R. 16). Travelers checks are normally signed by the purchaser at the time of purchase and countersigned at the time they are cashed (R. 79-80). The checks involved in the instant case bore no purchaser's signature. The evidence established that they, together with express money order forms, had been stolen from the office of the American Express Company in Atlantic City, New Jersey, during the night of October 25, 1945 (R. 3-4, 28-29). One of the men involved in the theft brought the checks and money orders to Rosenberg in Newark, New Jersey, on October 27, and left them with Rosenberg (R. 29-31, 40-42). On October 28, Rosenberg met petitioner by accident in New York City (R. 20-21, 44). He told

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petitioner about the checks and money orders and told him to come to Newark to get them (R. 45). Late that night petitioner went to see Rosenberg in Newark, and took the checks and money orders, saying, "I will see if I can do anything with them" (R. 46-47). Subsequently petitioner called Rosenberg from New York (R. 48, 154, 156). The checks and money orders were found in petitioner's possession when he was arrested early in the morning of November 1 at the Hotel Taft in New York (R. 85-87, 132-133, 182-184).

During the trial, after the checks and money orders had been received in evidence without objection as to the method by which they had been obtained (Gov. Exs. 2 & 3, R. 15), petitioner's attorney raised a question as to the lawfulness of the search and seizure (R. 89). The judge heard evidence on this issue outside the presence of the jury and held that the checks were admissible (R. 102, 216-221).

The following facts as to the search were established at that hearing and by the testimony of the agents at the trial:

On October 31, 1945, agents of the F.B.I. received information that an individual who "in all probability was Mr. Petti" was living at a room in the Hotel Taft (R. 93). The agents knew that petitioner was sought as a deserter from the army, and that a bench warrant had been issued for him by the federal district court in Newark, New Jersey, on a charge of an O.P.A. violation (R. 100-101). At

about 7:30 p.m. on October 31, four agents went to the Hotel Taft (R. 84, 127, 179). One of the agents called petitioner's room from the hotel lobby, but received no answer (R. 127). Two of the agents remained in the lobby and two others, accompanied by the assistant manager of the hotel, went up to petitioner's room (R. 84, 94, 127). The assistant manager unlocked the door for the agents with a pass key, and then locked the door behind the agents (R. 84, 92-93, 128). The agents ascertained that petitioner was not in the room, and then remained there (R. 84, 93, 127-128). At about 1:30 a.m. petitioner arrived (R. 84, 129). He had not been seen by the agents stationed in the lobby of the hotel (R. 129, 181). Petitioner was arrested and searched, and his room was searched incident to the arrest (R. 85, 130). In the closet of the room the agents found a suitcase (R. 85, 131). Petitioner remarked that if he had known what was going to happen, he would have disposed of the suitcase (R. 85, 106, 132, 183). The agents asked petitioner for the key for the suitcase and he replied that he did not have it. However, among the things the agents had found on petitioner's person was the key. The agents opened the suitcase and found the checks and money orders. (R. 85-87, 106, 131-132, 182-184.)

ARGUMENT

1. Petitioner attacks the validity of the search by which the checks were obtained on the ground that the agents acted illegally in remaining in the room

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after they had ascertained that he was not there (Pet. 7, 8, 10-13). Concededly, however, the agents, who knew of the outstanding warrant, had authority to arrest petitioner (see Rules 4(c)(3) and 9(c), F. R. Crim. P.). Concededly also, the agents had authority to make an entry without petitioner's consent in order to effectuate the arrest. *Lane* v. *United States*, 148 F. 2d 816 (C.C.A. 5), certiorari denied, 326 U. S. 720; *United States* v. *Faw*, 1 Cranch C.C. 487. Since, therefore, the agents had the right to enter petitioner's room, they had the right to remain there until they could accomplish the purpose for which the entry was made, i.e., the arrest of petitioner. They could not be certain of identifying him as he passed through the lobby of so busy a hotel as the Hotel Taft, and, in fact, he was not observed by the agents stationed in the lobby. Had the agents taken up positions in the corridor, petitioner might well have sensed their purpose and endeavored to escape. The surest way to effectuate the arrest was to do what the agents did—remain in the room which they had rightfully entered until petitioner returned.

Beyond this aspect of the case, the validity of the search is, as the court below held, governed by *Harris* v. *United States*, 331 U. S. 145. The nature of the O.P.A. violation for which petitioner was arrested is not spelled out in the record because the trial judge was under the erroneous impression that the nature of the charge was irrelevant (see R. 95,

96). It is significant, however, that petitioner does not deny that his suitcase was a proper object to be searched as incident to his arrest for that crime.[1] And when in that suitcase the agents discovered before their eyes property manifestly stolen, which petitioner in effect admitted he had no right to possess, property which obviously could be used to commit crime, the agents were, we submit, under a duty to take that property in their possession. *Harris* v. *United States,* 331 U. S. at 155.

This case does not present the problem involved in *Trupiano* v. *United States,* No. 427, O.T. 1947, decided June 14, 1948, holding that a search warrant must be obtained when agents have sufficient time and information to obtain one. A search incident to an arrest for the instrumentalities of the crime for which an arrest is made has, historically, been deemed an exception to the rule requiring a search warrant, and has been allowed even where, as here, the instrumentalities of the crime, although generally known, have not been identified with the specificity required for search warrants. As this Court pointed out in the *Harris* case, 331 U. S. at 150-151:

> Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement

[1] The files of the department reveal that petitioner was charged with possession of counterfeit tire replacement certificates. Manifestly, the instrumentalities of such a crime might well be concealed in a suitcase.

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procedures of the United States and of the individual states.

We do not understand the *Trupiano* decision to have changed that rule.

2. Petitioner also contends (Pet. 7, 8, 13-18) that, since the travelers checks did not bear the signature of a purchaser, they were incomplete instruments which are not securities within the purview of the National Stolen Property Act and which have no value.

Section 2(b) of the National Stolen Property Act, defining securities (*supra*, pp. 2-3) specifically mentions travelers checks, and broadly defines securities to include spurious as well as genuine instruments. It is noteworthy that this broad definition was adopted as part of the 1934 act before the 1939 amendment was added punishing the transportation of forged or counterfeit securities without regard to their value.[2] The definition clearly manifests an intent to cover, under the 1934 act, not only genuine obligations and evidences of indebtedness, but also any form of such instruments which, in a practical, rather than a technical sense, could be deemed to have value. Hence, the nice, technical questions as to whether the travelers checks here involved would or would not be absolutely binding against the issuing company (see Note, *Negotiability of Travelers Checks*, 47 Yale L. J. 470), have no

[2] Act of August 3, 1939, c. 413, § 1, 53 Stat. 1178, 18 U.S.C. 415.

relevancy to the question of the coverage of the criminal statute. The checks are certainly securities within the broad definition of the Act. See *Peoples Savings Bank* v. *American Surety Co.*, 15 F. Supp. 911 (W.D. Mich.), holding that travelers checks not signed by a purchaser were securities within the coverage of an insurance policy covering theft of securities.

It is also clear that these securities had value. Only a double signature was necessary to render the checks on their face completely valid instruments. As pointed out in the *Peoples Savings Bank* case, *supra,* it is accepted practice for the issuing companies to make payments on stolen travelers checks to protect the ready negotiability of such instruments. Hence the instruments here involved could be used to obtain the cash value thereof by anyone signing and countersigning them. The court below therefore properly held that the instruments had the face value appearing thereon.

3. Petitioner's contention that the evidence is insufficient to support the verdict on the ground that there was no evidence of agreement between petitioner and Rosenberg to transport the securities across state lines (Pet. 8, 18-25), is without merit. The evidence shows that Rosenberg had the securities in New Jersey, that he told petitioner, who lived in New York, to come to New Jersey to get them, that petitioner obtained the securities in New Jersey at about one o'clock in the morning,

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that he subsequently called Rosenberg from New York, and that the securities were found in New York. Manifestly, the jury had ample justification for inferring that Rosenberg and petitioner understood that petitioner was to come to New Jersey for the purpose of taking the securities to New York to dispose of them. It is, of course, elementary, that the agreement which underlies a conspiracy charge need not be in express words, but may be established by showing a common understanding.

4. There is also no merit in petitioner's contention that his acquittal on the substantive count necessitates his acquittal on the conspiracy charge (Pet. 8, 25-28). The case of *Sealfon* v. *United States,* 332 U. S. 575, on which he relies, furnishes no support for his position. The *Sealfon* case turns on *res judicata,* the issue of whether a subsequent jury will be allowed to find a fact which another jury has previously found to the contrary. It has no application to inconsistencies in the determination of different counts by the same jury. Furthermore, even on the principle of *res judicata,* a finding that a person has not committed the complete offense is not a finding that he has not agreed with another to commit that offense and performed some act in furtherance of that agreement. Although, on the evidence in this case that petitioner had actually transported, as well as agreed to transport, the securities, the verdict may

be inconsistent, it is well established that inconsistency in a verdict does not invalidate it. *Dunn* v. *United States,* 284 U. S. 390, 393.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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